

Things could only get better: *Al-Jedda* beyond *Behrami*

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1. Introduction

For those concerned with the complex issues of international responsibility arising from peace support operations established under the auspices of the United Nations, the summer of 2011 was an eventful season. In June, only two years after they were approved on first reading, the Articles on the Responsibility of International Organisations were adopted by the International Law Commission on second reading.² In July, a Dutch Court of Appeal decided that the conduct of the Dutch battalion of UNPROFOR (Dutchbat) in Srebrenica in 1995 could be attributed to the Netherlands under international law, irrespective of whether the UN could also be deemed responsible.³ In August, the (then) Libyan Government asked the UN Secretary General to investigate alleged civilian deaths arising from NATO bombings during the military operation authorized by the Security Council –more proof, if any was needed, that international efforts for the maintenance of peace and security remain controversial and

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² See A/64/10 (2009); A/CN.4/L.778 (2011).

³ *Mustafic et al. v. the Netherlands*, LJN: BR0132, n. 200.020.173/01, 5 July 2011, at http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR0132&u_ljn=BR0132, unrep..

that questions of accountability of the United Nations and of member states authorized to use force by the Security Council are more and more pressing.⁴

July also saw a decision the historical importance of which should not be underestimated. The Grand Chamber of the European Court of Human Rights (ECtHR) held in *Al-Jedda v. United Kingdom* that the UK was responsible for the misconduct of its troops deployed as part of the UN-authorized Multinational Force in Iraq.⁵ Together with two other recent cases, *Al-Saadoon* and *Al-Skeini*,⁶ this may be the start of a trend in the ECtHR directed at clarifying and expanding the scope of the European Convention by partially overcoming two notorious sets of precedents: the *Behrami* jurisprudence on the attribution of conduct of military personnel involved in operations under UN auspices;⁷ and the particularly ambiguous *Banković* jurisprudence on the extraterritorial scope of human rights protection.⁸ This article focuses on the *Behrami* side of *Al-Jedda*'s story: the question of attribution of conduct. Despite the attempts by the ECtHR to pay lip-service to *Behrami* by distinguishing it on the facts, the practical result of *Al-Jedda* is that *Behrami* should no longer be considered 'good law' when it comes to attribution of conduct during UN-authorized peace support operations. This is a major development, given that *Behrami* was almost universally criticised by legal commentators for being wrong both as a matter of law and as a matter of policy.⁹

⁴ See <http://www.reuters.com/article/2011/08/20/us-libya-un-idUSTRE77J1ISC20110820>. The operation was authorized by UNSCR 1973(2011); see also UNSCR 2009(2011). The complex human rights situation during the conflict in Libya was addressed by Amnesty International (AI), 'The Battle for Libya: Killings, Disappearances and Torture', AI-Index MDE 19/025/2011, 13 September 2011.

⁵ *Al-Jedda v. United Kingdom* (GC), n. 27021/08, 7 July 2011, 30 BHRC 637 (*Al-Jedda* (GC) hereinafter). Among the first comments appeared on the case, see M. Milanović, 'European Court Decides *Al-Skeini* and *Al-Jedda*', *Blog of the European Journal of International Law*, 7 July 2011, at <http://www.ejiltalk.org/european-court-decides-al-skeini-and-al-jedda/>.

⁶ See *Al-Saadoon and Mufdhi v. the United Kingdom* (Admissibility), n. 61498/08, 30 June 2009, 49 EHRR SE11; *Al-Saadoon and Mufdhi v. the United Kingdom* (Merits) (Fourth Section), n. 61498/08, 2 March 2010, 51 EHRR 9; *Al-Skeini and others v. United Kingdom* (GC), n. 55721/07, 7 July 2011, 53 EHRR 18.

⁷ *Behrami v. France and Saramati v. France, Germany and Norway* (Admissibility) (GC), nn. 71412/01 and 78166/01, 2 May 2007, (2007) 45 EHRR SE10 (*Behrami* hereinafter); see also *Dušan Berić and others v. Bosnia and Herzegovina* (Admissibility), n. 36357/04 and ots., 16 October 2007, (2008) 46 EHRR SE6; *Gajic v. Germany* (Admissibility), n. 31446/02, 28 August 2007, unrep; *Kasumaj v. Greece* (Admissibility), n. 6974/05, 5 July 2007, unrep; *Stephens v. Cyprus, Turkey and the United Nations* (Admissibility), n. 45267/06, 11 December 2008, unrep; *Blagojević v. the Netherlands* (Admissibility), n. 49032/07, 9 June 2009, unrep; *Galić v. the Netherlands* (Admissibility), n. 22617/07, 9 June 2009, unrep..

⁸ *Banković and others v. Belgium and 16 other member states* (Admissibility) (GC), n. 52207/99, 12 December 2001, (2002) 41 ILM 517. See also *Gentilhomme, Schaff-Benhadj and Zerouki v. France* (Merits), nn. 48205/99, 48207/99 and 48209/99, 14 May 2002; *Kalogeropolou and others v. Greece and Germany* (Admissibility), n. 59021/00, 12 December 2002; *Öcalan v. Turkey* (Merits), n. 46221/99, 12 March 2003, (2003) 37 EHRR 10; *Assanidze v. Georgia* (Merits) (GC), n. 71503/01, 8 April 2004, (2004) 39 EHRR 32; *Drozd and Janousek v. France and Spain*, n. 12747/87, 26 June 1992, (1992) 14 EHRR 745; *Ilaşcu and others v. Moldova and Russia* (Merits) (GC), n. 48787/99, 8 July 2004, (2005) 40 EHRR 46; *Issa and others v. Turkey* (Merits), n. 31821/96, 16 November 2004, (2005) 41 EHRR 27; *Marković and others v. Italy* (Merits) (GC), n. 1398/03, 14 December 2006, (2007) 44 EHRR 52.

⁹ See among others C.A. Bell, 'Reassessing Multiple Attribution: The International Law Commission and the *Behrami* and *Saramati* Decision', 42 *N.Y.U. J. Int'l L. & Pol.* (2010) 501-548; P. Bodeau-Livinec, G.P. Buzzini and S. Villalpando, 'Case note, *Behrami* & (and) *Behrami v. France; Saramati v. France, Germany, & (and) Norway*', 102 *Am. J. Int'l L.* (2008) 323-331; P. Klein, 'Responsabilité pour les faits commis dans le cadre d'opérations de paix étendue du pouvoir de contrôle de la Cour européenne des droits de l'homme: quelques considérations critiques sur l'arrêt *Behrami* et *Saramati*', 53 *A.F.D.I.* (2007) 43-64; B. Knoll, *The Legal Status of Territories Subject to Administration by International*

Before proceeding any further, it is necessary to define ‘attribution of conduct’ and ‘peace support operations under UN auspices’. The concept of ‘attribution of conduct’ is one of the key elements of the law of international responsibility. It determines when acts or omissions are deemed to belong to a state or an international organization (IO) for the purposes of responsibility. An internationally wrongful act is an act which is both attributable to a state or an international organization and which constitutes a breach of an international obligation owed by that state or international organization.¹⁰ Rules on attribution are contained in both the 2001 Articles on State Responsibility (ASR) and the 2011 Articles on the Responsibility of International Organizations (ARIO).

The ASR contain eight provisions on attribution of conduct, and courts have generally deemed these reflective of customary international law.¹¹ Articles 4, 5, 6 and 7 deal with the attribution of the on-duty conduct of ‘organs’, ‘persons or entities exercising elements of governmental authority’, and ‘organs placed at the disposal of the State by another State’, whose acts and omissions are attributed even if *ultra vires*. These may be called ‘institutional links’, because they arise from a continuous *ex ante facto* link between the state and the person carrying out the conduct under consideration. Articles 8 to 11 deal with conduct which is *prima facie* not the conduct of a state organ or of an entity exercising governmental authority on a continuous basis. This conduct may be attributed to a state because of a ‘factual’ link – one that is not continuous, but transient. The most important of these rules is Article 8 ASR, which addresses the attribution of conduct of private individuals acting ‘under the instruction of, or under the direction or control of’ a state. Factual links can also comprise relatively rare situations such as the adoption of the conduct of non-state actors by the state (Article 11), the exercise of elements of governmental authority ‘in the absence and in default

Organisations (Cambridge: Cambridge University Press, 2008), 367-381; P. Lagrange, ‘Responsabilité des Etats pour actes accomplis en application du Chapitre VII de la Charte des Nations Unies’, 112 *Revue gén. de droit int. pub.* (2008) 85-110; K.M. Larsen, ‘Attribution of conduct in peace operations: the “ultimate authority and control” test’, 19 *Eur. J. Int’l L.* (2008) 509-531; M. Milanović and T. Papić, ‘As Bad as It Gets: The European Court of Human Rights’s *Behrami* and *Saramati* Decision and General International Law’, 58 *Int. Comp. Law. Q.* (2009) 267-296; P. Palchetti, ‘Azioni di forze istituite o autorizzate delle Nazioni Unite davanti alla Corte europea dei diritti dell’uomo: i casi *Behrami* e *Saramati*’, 90 *Riv. Dir. Int.* (2007) 681-704; A. Sari, ‘Jurisdiction and International Responsibility in Peace Support Operations: the *Behrami* and *Saramati* cases’, 8 *Hum. Rts. L. Rev.* (2008) 151-170; L.-A. Sicilianos, ‘L’(ir)responsabilité des forces multinationales?’, in L. Boisson de Chazournes and M. Kohen (eds), *Liber Amicorum Vera Gowlland-Debbas* (Leiden: Martinus Nijhoff, 2010) 95-125, at 102-106; J. Welch and A. Fairclough, ‘Kosovo: contracting states acting under UN mandate - inadmissibility *ratione personae*’, 12 *Eur. Hum. Rts. L. Rev.* (2007) 698-703.

¹⁰ Art. 2, International Law Commission, ‘Articles on the Responsibility of States for Internationally Wrongful Acts’, annexed to United Nations General Assembly resolution 56/83, UN Doc. A/RES/56/83, 12 December 2001 (ASR hereinafter) and Art. 4 ARIO. See B. Stern, ‘The Elements of an Internationally Wrongful Act’, in J. Crawford, A. Pellet and S. Olleson (eds), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) 193-220. In order to establish responsibility, none of the ‘circumstances precluding wrongfulness’ of Part One, Chapter V ASR (and their ARIO equivalent, as to IOs) must apply.

¹¹ See the compilation of decisions edited by the UN Secretariat: A/62/62 and Corr.1 and Add.1 (2007); A/65/76 (2010).

of the official authorities' (Article 9) and the conduct of successful insurrectional movements (Article 10). This distinction between 'institutional' and 'factual' links is fundamental. Institutional links reflect a permanent relationship between the state and its organs and parastatal entities. They define what is the 'state sector', as opposed to the 'non-state sector'.¹² The spectrum of conduct performed by organs and parastatal entities which is attributed to states is consequently broad, because their every on-duty act and omission, even if performed *ultra vires*, is attributable. By contrast, factual links may be described as a link between the state and the conduct itself, by reason of (for instance) the instruction, direction or control exercised over the actor at the time the conduct was performed. Any on-going relationship between the actor and the state is thus irrelevant. This considerably reduces the spectrum of attributable conduct, because there is no attribution of conduct contravening precise instructions.¹³

The ARIOS are much shorter than the ASR in their consideration of attribution of conduct. Articles 6, 7, 8 and 9 deal respectively with the attribution of conduct by organs and agents of IOs, the attribution of conduct by organs or agents placed at the disposal of an international organization, the attribution of *ultra vires* conduct of such actors, and the adoption of conduct by an international organization. The encompassing concept of the 'agent' of an international organization is meant to cover both 'institutional' and 'factual' links with an IO, in an unfortunate departure from the clear distinction in the ASR.

The term 'peace support operations under UN auspices' encompasses both 'UN-run' operations and 'UN-authorized' operations. 'UN-run' operations occur when the Security Council mandates the Secretary-General to establish and run a military operation, with or without the consent of the local government(s). This is what is usually referred to as 'UN peacekeeping', an example of which was MONUC in the Democratic Republic of Congo.¹⁴ 'UN-authorized' operations occur when the Security Council authorizes member states or regional organizations to use 'all necessary means' (including military force) for the purpose of enforcing or maintaining the peace, again irrespective of the consent of the local government(s). These operations are often referred to as 'peace enforcement' or 'peace

¹² International Law Commission, 'First report on State responsibility by Mr. James Crawford, Special Rapporteur', A/CN.4/490, *Yearbook...* 1998, vol. II(1), 1-80, 1998, at 33-34.

¹³ International Law Commission, 'Commentaries to the Articles on State Responsibility', *Yearbook...* 2001, vol. II, pp. 26-143, available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (ASR Commentaries hereinafter), 48.

¹⁴ See generally United Nations, 'United Nations Peacekeeping Operations: Principles and Guidelines', (Capstone Doctrine), 18 January 2008, available at http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf. On MONUC, see UNSCR 1291(2000), 1564(2004), 1797(2008), 1856(2008), and 1925(2010). More robust peacekeeping and enforcement operations, such as UNPROFOR mentioned above, have also been run by the United Nations in the past.

making' operations; an example thereof was the NATO-led Kosovo Force (K-FOR).¹⁵ To determine whether a certain operation is a 'UN-run' or 'UN-authorized' one, reference must be made to 'who exercises operational command and control over the force. If it is the [Security] Council or a UN organ which exercises these powers then it is a UN force. If, however, it is a Member State or a regional organization then it is a UN authorized force'.¹⁶ The distinction between UN-run and UN-authorized operations is crucial to issues of attribution of conduct. Given the facts in *Al-Jedda*, I will focus only on UN-authorized operations here.

2. The judicial history of Al-Jedda's internment

Hilal Al-Jedda was a dual Iraqi-British national who was arrested in Baghdad in October 2004 and detained without charge or trial for 'imperative reasons of security in Iraq' until mid-December 2007.¹⁷ He was held in British custody in Basra. In early 2005, he started proceedings in the High Court to challenge the legality of his detention and obtain a transfer to the United Kingdom. He claimed that his detention violated the UK Human Rights Act 1998 because it was in breach of Article 5 of the European Convention on Human Rights (ECHR).¹⁸ This establishes that 'everyone has the right to liberty and security of person' and that 'no one shall be deprived of his liberty' save in some specific cases enumerated in the Article and 'in accordance with a procedure prescribed by law'. The Divisional Court and the Court of Appeal both dismissed the claim, albeit for slightly different reasons.¹⁹ The House of Lords upheld the decision by the Court of Appeal and affirmed that, although Al-Jedda's internment could be attributed to the United Kingdom, Article 5 ECHR rights were displaced and/or qualified by UN Security Council resolutions authorizing the use of force by the Multinational Force in Iraq (MNF-I).²⁰ These resolutions imposed 'an obligation upon the

¹⁵ See UNSCR 1244(1999).

¹⁶ D. Sarooshi, *The United Nations and the development of collective security: the delegation by the UN Security Council of its Chapter VII powers* (Oxford: Clarendon Press, 1999), 163. See also C. Gray, *International Law and the Use of Force* (3rd ed., Oxford: Oxford University Press, 2008), 254-428.

¹⁷ *Al-Jedda (GC)*, [9-15]. The formula 'imperative reasons of security' is employed in the letter annexed to UNSCR 1546(2004), which in turn uses the language of Art. 78 of the Fourth Geneva Convention, 75 UNTS 287. Al-Jedda was released without charge (and without apparent reason) a few days after the House of Lords dismissed his appeal. He was also deprived of his UK citizenship on the basis that doing so was 'conducive to the public good': *Al-Jedda (GC)*, [14].

¹⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222.

¹⁹ *R. (Al-Jedda) v. Secretary of State for Defence*, 12 August 2005, [2005] EWHC 1809 (Admin) and *R. (Al-Jedda) v. Secretary of State for Defence*, [2006] EWCA Civ 327, 29 March 2006, [2007] QB 621.

²⁰ *R. (Al-Jedda) v. Secretary of State for Defence*, [2007] UKHL 58, 12 December 2007, [2008] 1 AC 332 (*Al-Jedda (HL)* hereinafter). See also Larsen, above n. 9; A. Orakhelashvili, 'R (on the Application of Al-Jedda) (FC) v. Secretary of State for Defence', 102 *Am. J. Int'l L.* (2008) 337-345; C. Tomuschat, 'R (on the Application of Al-Jedda) v. Secretary of State for Defence - Human Rights in a Multi-Level System of Governance and the Internment of Suspected Terrorists', 9 *Melb. J. Int'l L.* (2008) 391-404. The House of Lords judgment was analysed by the present author in F. Messina, 'The House of Lords in *Al-Jedda* and Public International Law: Attribution of Conduct to UN-authorized Forces and the Power of the Security Council to Displace Human Rights', 56 *Neth. Int'l L. Rev.* (2009) 35-62.

United Kingdom to carry out' the internment.²¹ Were it not for such obligation, the internment would plainly have violated Article 5 ECHR.²²

The ECtHR's Grand Chamber was seized of essentially the same matter in *Al-Jedda v. United Kingdom*. The ECtHR agreed with the House of Lords in attributing Al-Jedda's internment to the United Kingdom, but reached a different conclusion as to Article 5 ECHR. Relevant Security Council resolutions neither qualified, nor displaced Article 5 ECHR, and therefore the UK had breached Al-Jedda's Article 5 rights.²³ The ECtHR ordered the UK to pay Al-Jedda a monetary compensation of € 25,000, but determined that only part of the legal costs incurred by the applicant would be reimbursed.²⁴ In this article we are not dealing with the international obligations owed by the UK under Article 5 ECHR, nor with the question of the potential conflict between Article 5 ECHR and Security Council resolutions authorizing internment.²⁵ Instead, our focus here is on whether the detention of Al-Jedda should be attributed to the United Kingdom (as was held implicitly by lower domestic courts and explicitly by the House of Lords and the ECtHR) or whether it could be attributed exclusively to the United Nations because of the Security Council authorization to use force in Iraq (as the British Government argued before the House of Lords and the ECtHR). Much of this discussion turned on the applicability to this case of the *Behrami* admissibility decision, which had been rendered by the ECtHR in May 2007.²⁶ It is to this that I will now turn.

3. Saramati's detention and Sarooshi's theory of delegation

The *Behrami and Saramati* admissibility decision was among the most controversial judgments adopted by the European Court in recent years.²⁷ The events leading to the separate applications of Behrami and Saramati had occurred in Kosovo. An undetonated NATO bomb had killed and injured Behrami's two sons in 2000, and the applicant deemed

²¹ *Al-Jedda (HL)*, [135] per Lord Carswell; see also [32-39] per Lord Bingham.

²² *Al-Jedda (HL)*, [27] per Lord Bingham: the internment would not fall under any of the exceptions provided in points a) to f) of Art. 5(1) ECHR.

²³ *Al-Jedda (GC)*, [97-110].

²⁴ *Al-Jedda (GC)*, [112-117]. By awarding only € 40,000 for legal expenses out of the requested £ 85,946.32 GBP, and even factoring in the compensation of € 25,000, the judgment would effectively leave Al-Jedda out of pocket by about € 30,000 should his legal counsels indeed charge him the full amount requested; this is in addition to previous legal costs at domestic level. The message from the Court seems to be that suspected terrorists should choose cheaper counsels when their human rights are violated.

²⁵ I have elsewhere discussed my views on this potential norm conflict with reference to the decision by the House of Lords: Messineo, above n. 20, 47-61. I stand by those comments *mutatis mutandis* notwithstanding the cunning (and progressive) solution adopted by the ECtHR, which chose to pretend that no norm conflict existed in order to 'save' both the full application of Art. 5 ECHR and the theoretical supremacy of the UN Charter under Art. 103 UNC. See *Al-Jedda (GC)*, [97-110] and the important dissenting opinion by Judge Poalelungi.

²⁶ Above n. 7.

²⁷ Aside from most of the commentators mentioned above at n. 9, both the International Law Commission and the UN Secretariat authoritatively criticised *Behrami*: see International Law Commission, 'Commentaries on the Draft Articles on the Responsibility of International Organizations Adopted on First Reading', *Report of the International Law Commission to the General Assembly*, A/64/10, 39-178 (DARIO Commentaries hereinafter), at 67.

French K-FOR troops responsible for the lack of de-mining in the area.²⁸ Saramati had been imprisoned from 2001 to 2002 by the order of French and Norwegian K-FOR officials – his situation in this respect being quite similar to that of Al-Jedda.²⁹ The Grand Chamber of the Court jointly declared the two applications inadmissible. The ECtHR decided that it had no jurisdiction *ratione personae* because K-FOR's conduct should be attributed exclusively to the United Nations by virtue of the 'ultimate authority and control' of the Security Council over the operation.³⁰ The fact that 'effective command of the relevant operational matters was retained by NATO' was irrelevant to attribution, according to the ECtHR, because such command was part of the powers legitimately delegated by the Security Council to member states.³¹

This language of delegation employed by the ECtHR in *Behrami* had a specific origin.³² In an influential book published in 1999, Dan Sarooshi expressed the view that the distinction between UN-run (peacekeeping) operations and UN-authorized (peace enforcement) missions was irrelevant to questions of attribution of conduct. In both UN-authorized and UN-run operations, he argued, 'the question of who exercises *operational* command and control over the force is immaterial to the question of responsibility. The more important enquiry is who exercises *overall* authority and control over the forces'.³³ In particular, whenever the Security Council authorized member states to use force, the 'acts' of these forces were 'attributable to the UN, since the forces are acting under UN authority'.³⁴ The only two exceptions to this principle were cases where the Council was 'prevented from exercising overall authority and control over the force', or when the forces acted beyond the 'delegated mandate and authority' they received.³⁵ In Sarooshi's view, whenever the Security Council established peacekeeping forces or authorized the use of force by member states, the Council was delegating some of its powers, respectively to the Secretary-General and to those member states.³⁶ The premise of his argument on attribution was that the Security Council could only delegate some powers (those it had, but not those it had itself been delegated to

²⁸ *Behrami*, [61].

²⁹ *ibid.*, [5-7; 8-17].

³⁰ *ibid.*, [140].

³¹ *ibid.*, [140].

³² See Larsen, above n. 9, 521. See also Milanović and Papić, above n. 9.

³³ Sarooshi, above n. 16, 163.

³⁴ *ibid.*, 165.

³⁵ *ibid.*, 165.

³⁶ *ibid.*, 50-85 and 142-246.

exercise);³⁷ from this, it followed that the Council must retain a degree of control over the forces and remain actively involved throughout.³⁸

Sarooshi's construction is problematic, for reasons which cannot fully be addressed here. Suffice it to say, first, that this view substitutes an 'is' for an 'ought': it essentially implies that attribution must be to the UN because the UN Security Council is (allegedly) under an obligation to retain an overall control over them. But such control may well be lacking as a matter of fact. Second, the theoretical framework of delegation is not unanimously accepted. While many recognize it as a very important original contribution to the conceptualization of Security Council action,³⁹ the theory of 'delegation' is slightly divorced from practice – more '*de lege ferenda*' than '*lex lata*', as Kirgis put it.⁴⁰ In fact, the distinction between UN-run and UN-authorized operations for the purposes of attribution is grounded on over sixty years of UN practice to that effect.⁴¹

Aside from the doctrinal value of Sarooshi's theory, what is surprising is that the ECtHR implicitly adopted it as the *lex lata* without any explanation. The Court reaffirmed this adoption of the delegation theory in various other cases after *Behrami*. The most interesting of these is the *Dušan Berić* case,⁴² where the very complex question of the attribution of the conduct of the Office of the High Representative in Bosnia-Herzegovina (an institution belonging to the Bosnian constitutional framework arising from the Dayton Agreements) was discussed in terms of the 'delegation' of power from the Security Council.⁴³ The Court offered no plausible reason as to why it adopted the delegation framework, nor why such adoption would lead to the criterion of 'ultimate authority and control' being applied to the question of attribution of conduct.⁴⁴ The Court switched from Sarooshi's

³⁷ *ibid.*, 20-45 (Sarooshi based this assertion on the doctrine, common to some domestic legal systems, that *delegatus non potest delegare*; but the transmigration of this doctrine to international law is not uncontroversial).

³⁸ *ibid.*, 163-164.

³⁹ See e.g. the Foreword to the book by Rosalyn Higgins: *ibid.*, xi-xii.

⁴⁰ F.L. Kirgis, 'Book Review of David Malone, *Decision-Making in the UN Security Council: The Case of Haiti, 1990-1997* and Danesh Sarooshi, *The United Nations and the Development of Collective Security*', 93 *Am. J. Int'l L.* (1999) 970-975, at 975.

⁴¹ The UN Secretariat expressed this view forcefully before the International Law Commission: A/CN.4/637/Add.1 (2011), esp. at 10.

⁴² See above n. 7.

⁴³ *Berić case*, above n. 7, [27]. *Berić* was one of the 26 politicians who were removed from office in the Republika Srpska by the High Representative in Bosnia-Herzegovina between 2004 and 2005 because of their lack of cooperation with the International Criminal Tribunal for the Former Yugoslavia. *Berić* and the other applicants claimed that their removal from office violated Bosnia's human rights obligations, in particular Art. 6, Art. 11 and Art. 13 ECHR. The ECtHR declared their applications inadmissible because in its view the acts of the High Representative could not be attributed to Bosnia-Herzegovina, but should be attributed to the United Nations.

⁴⁴ The ECtHR referred to two other authorities in *Berić*, but neither of them supports its conclusions. These are: B.-O. Bryde and A. Reinisch, 'Article 48', in B. Simma (ed) *The Charter of the United Nations: a commentary*, vol. 1, (2nd ed., Oxford: Oxford University Press, 2002) 775-780; C. Stahn, 'International Territorial Administration in the former Yugoslavia: Origins, Developments and Challenges ahead', 61 *ZaöRV* (2001) 107-176.

‘overall authority and control’ test to an ‘ultimate authority and control’ test in *Behrami*, which was then transformed again into an ‘effective overall control’ test in *Berić*.⁴⁵

4. Lord Bingham’s distinction vs. Lord Rodger’s dissent

A few months after *Behrami*, the House of Lords reached the conclusion that Al-Jedda’s internment should be attributed to the United Kingdom, even if Saramati’s detention had been deemed attributable exclusively to the UN by the ECtHR. However, possibly out of deference to the European Court, their Lordships stopped short of declaring that the ECtHR test of ‘ultimate authority and control’ was wrong and instead set out to distinguish *Behrami and Saramati* on their facts. I have discussed elsewhere the lack of a clear common rationale for such a distinction, as well as the intrinsic weakness of the arguments advanced by the majority of the House of Lords in this regard.⁴⁶ I will briefly summarize that debate here because it is at the heart of what the ECtHR decided in July 2011.

The late Lord Bingham delivered the leading judgment in *Al-Jedda v UK*. When distinguishing the situation before him and that in *Saramati*, he was of the view that the detention of these two individuals, Saramati’s by K-FOR and Al-Jedda’s by MNF-I, were not analogous. Coalition forces had not been sent to Iraq by the UN, nor had the Coalition Provisional Authority been set up by the Security Council.⁴⁷ The forces obviously had no UN mandate when they began their military occupation, which formally lasted until the handing over of power to the Iraqi interim Government on 28 June 2004.⁴⁸ In his view, the relevant Security Council resolutions could not be interpreted as a delegation of power, but as an authorization to the UK to carry out functions that the Security Council could not perform itself.⁴⁹ Furthermore, it could not ‘realistically be said that US and UK forces were under the effective command and control of the UN, or that UK forces were under such command and control when they detained the appellant’.⁵⁰ Such test of ‘effective command and control’

⁴⁵ Such a test may at first glance appear similar to that in *Loizidou v. Turkey (Merits) (GC)*, n. 15318/89, (1997) 23 EHRR 513, but in *Loizidou* the Court employed the term ‘effective overall control’ when addressing a question relating to the extra-territorial scope of ECHR obligations under Art. 1, not a question of attribution of conduct (the Court solved the attribution question there by casting Northern Cyprus authorities as an administrative subdivision of Turkey, i.e. an organ thereof): compare M. Milanović, ‘From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties’, 8 *Hum. Rts. L. Rev.* (2008) 411-448, at 436-446 with K.M. Larsen, ‘Attribution of conduct in peace operations: the “ultimate authority and control” test’, 19 *Eur. J. Int’l L.* (2008) 509-531, at 518-520.

⁴⁶ Messineo, above n. 20, 43-47.

⁴⁷ *Al-Jedda (HL)*, [23].

⁴⁸ *Ibid.*, [16] and [23].

⁴⁹ *Ibid.*.

⁵⁰ *Ibid.*, [23].

was the determining one; it arose from the ILC Draft Articles on the Responsibility of International Organizations.⁵¹

On the other hand, the late Lord Rodger was of the opinion that the legal situation of Saramati's detention by K-FOR and Al-Jedda's detention by the MNF-I was similar. First, the comparison had to be made with reference to the time of the detention, not earlier, so that the difference in how the two operations were established was irrelevant.⁵² Second, the MNF-I became a UN-authorized operation (just like KFOR) when it received a mandate from the Security Council.⁵³ Third, the UN had no more 'effective control' over Saramati's detention than they had over Al-Jedda's detention.⁵⁴ Fourth, the authorization to 'take all necessary measures to contribute to the maintenance of security and stability in Iraq' in UNSCR 1546 was 'essentially similar to the authorisation given to K-FOR in Resolution 1244'.⁵⁵

5. The problematic distinguishing of *Behrami* by the ECtHR

Unsurprisingly, the UK Government and Al-Jedda's counsel referred extensively to the debate between Lord Bingham and Lord Rodger when the case was heard before the ECtHR. The UK Government relied heavily on Lord Rodger's opinion and argued that Lord Bingham had 'failed to give proper effect to' *Behrami*.⁵⁶ The mandate of both K-FOR and MNF-I was approved by the Security Council under Chapter VII, and in both cases there had been a delegation of power in the sense discussed above.⁵⁷ The UK had not 'detached' itself 'from the Security Council mandate'.⁵⁸ Furthermore, from June 2006 onwards it had been Iraqi and US authorities, not UK authorities, that had 'authorised' Al-Jedda's internment by British forces.⁵⁹ The Government also argued that there were important reasons that militated against the application of the ECHR 'in the context of the multinational force's multinational and unified command structure' where some participating states were not parties to the ECHR.

⁵¹ Ibid., [5]. The test was also mentioned (but then ignored) in *Behrami*, [30]. This reliance by Lord Bingham on 'effective command and control' rather than *Behrami*'s 'ultimate authority and control' may be taken as an implicit sign that their Lordships were not paying much more than lip-service to *Behrami* after all. But the fact remains that they formally decided to distinguish it on the facts. Another possible route of distinguishing would have been that regarding *Behrami* as only applying to cases of UN territorial administration (such as UNMIK): the decision has recently been so interpreted by A. Sari, 'Autonomy, Attribution and Accountability: Reflections on the Behrami Case', in R. Collins and N. D. White, *International organisations and the idea of autonomy* (London: Routledge, 2011), 257-277. This construction, however, seems to discount that Sarooshi's theory (on which *Behrami* is based) is premised on the idea that there is no difference between UN-run and UN-authorized operations when it comes to attribution of conduct.

⁵² *Al-Jedda (HL)*, [61].

⁵³ Ibid., [63].

⁵⁴ Ibid., [65].

⁵⁵ Ibid., [77]. See UNSCR 1244(1999); UNSCR 1546(2004).

⁵⁶ *Al-Jedda (GC)*, [64].

⁵⁷ Ibid., [65-66].

⁵⁸ Ibid., [67].

⁵⁹ Ibid..

Apart from the ‘real uncertainty’ of the resulting responsibilities, there could be a risk of ‘detering contracting parties from contributing troops’ in the future.⁶⁰

Al-Jedda’s counsel argued that the House of Lords was right in its distinguishing of *Behrami*.⁶¹ First, the ‘invasion of Iraq ... was not a United Nations operation’, whereas K-FOR had a clear humanitarian scope.⁶² Second, there was no delegation of power to the MNF-I, but ‘a simple authorization’ by the Security Council, while the ‘unified command over the multinational force was, as it had always been, under the control and authority of the United States and the United Kingdom’.⁶³ Third, the United Nations Secretariat was clearly of the opinion that the MNF-I was not ‘under United Nations authority and control’.⁶⁴ Crucially, Al-Jedda’s counsel also argued that ‘multiple and concurrent attribution was possible in respect of conduct deriving from the activity of an international organization and/or one or more States’, and that the policy arguments advanced by the British Government were to be viewed with some ‘scepticism’ given that issues of attribution were raised by the Government only in the proceedings before the House of Lords, and never before.⁶⁵

The European Court agreed with Al-Jedda’s counsels and explicitly concurred with the majority of the House of Lords – in particular the Court approved Lord Bingham’s distinguishing of *Behrami*.⁶⁶ The adoption of UNSCR 1511(2003) and 1546(2004) had not altered the unified command structure of the Multinational Force, which had remained substantially the same since the invasion in March 2003; nor had the UN assumed ‘any degree of control’ over MNF-I.⁶⁷ Indeed, other UN organs, such as the UN peacekeeping mission (UNAMI) and the Secretary-General, had ‘repeatedly protested about the extent to which security internment was being used by the Multi-National Force’, a clear sign, in the Court’s view, that the UN was not in charge.⁶⁸ The situation in Kosovo was different, because of the language employed in UNSCR 1244(1999) and of the different role of the UN there.⁶⁹ Whether adopting the ‘effective control’ test arising from the Draft Articles on the Responsibility of International Organizations or the ‘ultimate authority and control’ test of

⁶⁰ Ibid., [68].

⁶¹ Ibid., [70].

⁶² Ibid., [71].

⁶³ Ibid., [72].

⁶⁴ Ibid..

⁶⁵ Ibid., [69].

⁶⁶ Ibid., [83-86].

⁶⁷ Ibid., [80]; see also [81].

⁶⁸ Ibid., [82].

⁶⁹ Ibid., [83].

Behrami, the result would be the same: Al-Jedda's detention was 'not ... attributable to the United Nations',⁷⁰ but to the United Kingdom.

While it is correct that Al-Jedda's detention was certainly not attributable to the UN, this distinguishing of Saramati's detention from Al-Jedda's detention is problematic. The arguments put forward by Lord Rodger in the House of Lords are still valid *mutatis mutandis* with respect to the ECtHR judgment. Two elements are worth emphasizing here. First, the European Court failed to give proper consideration to the crucial role of UNSCR 1511(2003). The ECtHR maintained that the command structure of the coalition did not change after the invasion. This may be generally true, as evidenced for example by the fact that the UK and the US components of the mission kept the same names, 'Telic' and 'Iraqi Freedom' respectively. But some significant changes did occur in the composition of the force after May 2003. Many other countries joined the UK, the US, Australia and Poland (the four original invading countries).⁷¹ Whatever the (lack of) legal authority for the invasion of Iraq of March 2003, the adoption of UNSCR 1511 in October 2003 established this 'new' international coalition as a UN-authorized mission.⁷² Despite some degree of operational continuity, this was a different legal entity from the coalition that invaded Iraq.

Second, K-FOR was somewhat analogous to the MNF-I even as to the circumstances of its creation. It is true that K-FOR started as an operation only after UNSCR 1244 of 10 June 1999, but NATO, which ran K-FOR, had been bombing the Federal Republic of Yugoslavia between 24 March 1999 and 10 June 1999 without any Security Council authorization to do so. Both in Kosovo and in Iraq, a highly controversial use of force by some states was followed by a resolution by the UN Security Council asking those same states and their allies to deal with the aftermath of the conflict they had started. Legally, Saramati's detention by K-FOR and Al-Jedda's internment by the MNF-I were wholly analogous in this respect too.

In sum, Lord Rodger was right that distinguishing *Behrami* on the facts was legally impossible. Quite simply – and Lord Rodger possibly would not have shared this view – *Behrami* was wrongly decided. Neither the conduct of K-FOR, nor that of MNF-I could ever be attributed to the United Nations – and that is why the UN was in a position to criticise both the MNF-I and K-FOR for the (different) procedure under which they carried out

⁷⁰ Ibid., [84].

⁷¹ For instance, Italy and other European countries only joined the coalition after UNSCR 1483(2003) recognized the role of occupying powers and of the Coalition Provisional Authority. See S. Giordano, 'Operazione "Antica Babilonia": primi ammaestramenti', *InfoDifesa*, 1/2007, available at http://www.difesa.it/Pubblicistica/info-difesa/Infodifesa140/Documents/Operazione_Antica_Babilon_429ammaestramenti.pdf, 12-19.

⁷² UNSCR 1511(2003), para 13.

internments.⁷³ Consistent UN and state practice over the last 60 years firmly distinguishes between UN-run operations (such as peacekeeping) and authorizations to use force granted by the Security Council to member states (such as K-FOR and MNF-I).⁷⁴ While questions may arise as to the attribution to the United Nations of the conduct of troops contributed by member states to UN-run operations, the conduct of UN-authorized troops is generally not attributable to the UN. This is because the UN has usually no form of control over them, as both the House of Lords and the ECtHR in *Al-Jedda* recognized.⁷⁵ The authorization by the Security Council has the unique purpose of rendering legal an act of member states which would otherwise be illegal under Article 2(4) of the UN Charter. The duty to report to the Security Council from time to time perhaps creates a situation of political endorsement, but not one of ownership on the part of the UN.⁷⁶ In other words, neither Article 6 ARIO, nor Article 7 ARIO are applicable to UN-authorized missions: the conduct of member states carrying out these operations is not the conduct of ‘organs or agents’ of the United Nations, nor is it the conduct of ‘state organs’ which are ‘put at the disposal’ of the United Nations. The idea that the conduct could be described as such would potentially lead to absurd consequences, which were hinted at by Lord Bingham when he said that it had not, to his knowledge, ever been suggested ‘that the treatment of detainees at Abu Ghraib was attributable to the UN rather than the US’.⁷⁷ Indeed, as Baroness Hale remarked, it would be ‘unlikely in the extreme that the United Nations would accept that the acts of the MNF were in any way attributable to the UN’.⁷⁸ The reason for this is not to be found in the degree of control of the UN over the MNF, for there was never any question that such control existed. There is a more radical reason: that the jailers of Al-Jedda were at all times UK organs under the definition of Article 4 ASR.⁷⁹

⁷³ The ECtHR referred to UN’s criticism of MNF-I in *Al-Jedda (GC)*, [82], but failed to notice that the UN Human Rights Committee expressed similar concerns regarding K-FOR at CCPR/C/UNK/CO/1 (2006), [17].

⁷⁴ Above, n. 41 and A/51/389 (1996), [17]. See also e.g. F. Seyersted, *United Nations forces in the law of peace and war* (Leyden: A.W. Sijthoff, 1966), 110-112. But see N.D. White and S. MacLeod, ‘EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility’, 19 *Eur. J. Int’l L.* (2008) 965-988, at 974 (in their opinion the positive legacy of *Behrami* was precisely the overcoming of such a distinction between UN-run and UN-authorized missions for the purposes of responsibility).

⁷⁵ See A/CN.4/637/Add.1 (2011), 12 (‘[T]he responsibility of the United Nations cannot be entailed by acts or omissions of those not subject to its command and control. Since the early days of peacekeeping operations the United Nations has recognized its responsibility and liability in compensation for acts or omissions of members of its peacekeeping operations, and by the same token, it has refused to entertain claims against other military operations — notwithstanding the fact that they were authorized by the Security Council. This practice has been uniform, consistent and without exception’).

⁷⁶ See *Al-Jedda (HL)*, [24] (‘It is quite true that duties to report were imposed in Iraq as in Kosovo. But ... it is one thing to receive reports, another to exercise effective command and control’).

⁷⁷ *ibid.*, [23].

⁷⁸ *ibid.*, [124].

⁷⁹ See also *Al-Saadoon and Mufdhi v. UK (Admissibility)*, above n. 6, esp. at [84-89] (the case was decided by the ECtHR under the assumption that the conduct of UK troops in Iraq was attributable to the UK, notwithstanding *Behrami*). Furthermore, in the *Al-Skeini* case, which involved the death of 6 civilians during the Iraqi conflict of 2003, the UK Government had not advanced the attribution question before UK courts (because *Behrami* had not been decided yet), but it

6. Was *Behrami* in fact ‘overruled’? Dual attribution and ‘effective control’

While Lord Bingham’s distinguishing of *Behrami* may perhaps be explained as a form of judicial deference towards the ECtHR,⁸⁰ the European Court was in a much better position to set aside its own *Behrami* decision. From a purely textual perspective, it may seem that it chose not to do so: the explicit reference to *Behrami* and the adoption of Lord Bingham’s unpersuasive factual distinction seem directed precisely at confirming that *Behrami* is still ‘good law’. But there is more. The Strasbourg court is not a common law court and courts without *stare decisis* have no particular duty to make it explicit when they ‘overrule’ a previous decision. Formally, ECtHR decisions are binding only on the parties of each case,⁸¹ and although the Grand Chamber was established with the explicit aim of resolving cases in which ‘a question before [a] Chamber might have a result inconsistent with a judgment previously delivered by the Court’,⁸² the Court as a whole is under no obligation to be consistent with its own precedents – although it can arguably be expected to explain why it chooses to depart from them. In this sense, *Behrami* was not ‘overruled’ because, despite the efforts of commentators and judges, it is difficult to read the ECtHR case law as a coherent system of mutually consistent judgments: the ECtHR could well decide again in conformity with *Behrami* next time it is faced with a question involving UN operations. But it is important to recognize that, despite the attempts of the ECtHR to distinguish *Behrami* on the facts, *Al-Jedda* cannot be meaningfully reconciled with *Behrami*. This irreconcilability – which in a common law court would be an implicit overruling – is quite striking.

The first crucial development is that in *Al-Jedda* the Court recognized the possibility that a certain conduct may be attributed both to the UN and to member states contributing troops to an operation authorized by the UN. One of the major criticisms of *Behrami* was precisely that it did not recognize such a possibility and answered the attribution question as one of ‘either/or’.⁸³ In *Al-Jedda* the ECtHR said:

The Court does not consider that, as a result of the authorisation contained in Resolution 1511, the acts of soldiers within the Multi-National Force became attributable to the United Nations or – *more importantly, for the purpose of this case* – *ceased to be attributable to the troop-contributing nations*.⁸⁴

raised it before the ECtHR and contended that, after the institution of the MNF in Iraq, all its acts would be attributable to the UN. The Court held that the UK Government was ‘estopped from raising this objection’ at the time of the proceedings, since it had not relied on this argument before national courts: *Al-Skeini v. United Kingdom (GC)*, above n. 6, [97-100].

⁸⁰ Such deference is due under British constitutional law because of the prevailing interpretation of the words ‘take into account’ in § 2(1) of the Human Rights Act 1998, which is (perhaps wrongly) seen as restricting the ability of British courts to depart from the ECtHR’s views on how to interpret ECHR rights: see Messineo, above n. 20, 46-47.

⁸¹ Art. 46 ECHR.

⁸² Art. 30 ECHR.

⁸³ See Messineo, above n. 20, 40-41; Sari, above n. 9, 159.

⁸⁴ *Al-Jedda (GC)*, [80] (emphasis added).

In other words, the possibility remained that the acts of soldiers could be attributed to more than one subject at a time (although this was not the case in *Al-Jedda*, because no UN attribution could be established, according to the Court).

Such a principle of dual or multiple attribution has long been endorsed by the International Law Commission. Both the Articles on State Responsibility and the Articles on the Responsibility of International Organizations recognize the possibility of multiple attribution.⁸⁵ This is because states may indeed act jointly, and so may international organizations, or states and international organizations. In fact, such ‘co-authorship’ of internationally wrongful acts is only one of the many potential situations of ‘multiple responsibility’.⁸⁶ ‘Co-authorship’ may arise in various situations, such as ‘joint action’ (i.e. a ‘joint conduct, carried out by a single action’) or ‘action through a joint organ’.⁸⁷ International law has no difficulty with the fact that the same conduct can at the same time be seen as the act of an individual and that of a collective entity, this ‘duality of responsibility’ being a ‘constant feature of international law’.⁸⁸ Likewise, a given conduct may well ‘belong’ to more than one collective entity at once. This can be explained in terms of layers of responsibility, or of spheres of influence, or even by analogy with quantum physics.⁸⁹ Quite simply, the point is that the answer to the ‘whodunit’ question in international law often yields two or three results at once: someone can be wrongfully detained by an individual, two states and an International Organization all at the same time.⁹⁰ It is worth re-emphasising, however, that this was not the case of *Al-Jedda*: he was not detained by the UN in any meaningful sense. Nonetheless, *pace Behrami*, the Court finally acknowledged that such dual attribution is possible. It also correctly construed what is now Article 7 ARIO as an important exception to such cases of dual attribution. According to this provision, where state or IO organs are genuinely ‘put at the disposal’ of the United Nations, and the sending state or IO no longer exercises control over them, attribution may also be transferred:

⁸⁵ See Art. 47(1) ASR and Art. 48(1) ARIO.

⁸⁶ See e.g. Articles 16, 17, 18 ASR and 17, 18, 61 and 62 ARIO (which are all cases of ‘indirect responsibility’), or the *Corfu Channel Case (United Kingdom v. Albania) (Merits)*, 9 April 1949, ICJ Rep. 1949, 4 (a situation where separate acts determined a single injury). On issues of multiple responsibility, see A. Nollkaemper, ‘Issues of Shared Responsibility before the International Court of Justice’, *SHARES Working Paper 1/2011*, (Amsterdam: Amsterdam Center for International Law), April 2011, available at <http://www.sharesproject.nl/wp-content/uploads/2011/04/Nollkaemper-Shared-Responsibility-before-the-ICJ-2011.pdf>.

⁸⁷ C. Dominicé, ‘Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State’, in Crawford, Pellet and Olleson (eds), *The Law of International Responsibility* 281-290, at 282-283.

⁸⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Judgment)*, 26 February 2007, ICJ Rep. 2007, [173]. See Chapter 2, § 1.A.

⁸⁹ See A. Clapham, ‘The Subject of Subjects and the Attribution of Attribution’, in L. Boisson de Chazournes and M. Kohen (eds), *Liber Amicorum Vera Gowlland-Debbas* (Leiden: Martinus Nijhoff, 2010) 45-58, at 57-58 (where reference is made to Bohr’s theory of complementarity regarding the wave-particle duality).

⁹⁰ See also ASR Commentaries, 124 and DARIO Commentaries, 56.

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

In order for this rule to apply, the IO must exercise ‘factual control ... over the specific conduct taken by the organ or agent placed at the receiving organization’s disposal’.⁹¹ Reasons of space do not permit me to offer here a full analysis of the text of Article 7 ARIO and its perhaps unfortunate choice of words.⁹² Nonetheless, the ‘effective control’ test is quite different from ‘ultimate authority and control’ in *Behrami*. The European Court in *Al-Jedda* cleverly stopped short of explaining which test it was actually applying to decide on attribution and mentioned both the thresholds of ‘effective control’ and ‘ultimate authority and control’ as not having been met:

[T]he Court considers that the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that the applicant’s detention was not, therefore, attributable to the United Nations’.⁹³

This can be read either as an attempt to keep *Behrami* alive or as a subtle overcoming of that decision. Only time will tell if this was in fact an ‘overruling’ of *Behrami*.

In sum, both the House of Lords and the European Court of Human Rights correctly held that Al-Jedda’s internment was attributable to the United Kingdom. However, their line of reasoning was understandably skewed by the notorious *Behrami* precedent, to the effect that what had been obvious throughout the earlier domestic stages of the case became an overly complex issue. British troops detaining Al-Jedda in a British detention facility in Iraq were British state organs under Article 4 ASR potentially engaging the responsibility of the United Kingdom under international law.

⁹¹ DARIO Commentaries, 63.

⁹² It seems that the intention of the International Law Commission was that of creating a rule analogous to Art. 6 ASR (see DARIO Commentaries, 63-64), in which case ‘effective control’ is a misleading term for its similarity to Art. 8 ASR (especially as interpreted in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Judgment)*, 26 February 2007, ICJ Rep. 2007, 43).

⁹³ *Al-Jedda (GC)*, [84].